85-562

No.

Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SPIKA, CHARLES KUEHNE, STEVEN POKORNY, RICHARD ENGEL, RICHARD SHAFER, DANE CUNY, FRANK PARTIPILO, RAYMOND CLARK, MARK GOUTY, PAUL NOLAN, ORIN WALKER, RICH MONTALTO, DANIEL NEUSTADT, DANIEL KELLY, BARBARA DURNIL, RICHARD STICKA, JOSE PEREZ, JAMES GLENNON, CHARLES GUTSMIEDL, Patrolmen of the Village of Lombard, Illinois, and **FRANK J. ESPOSITO, GLENN Q. FOSTER, SCOTT M. RYAN, MICHAEL J. TORRENCE, FRANK D. ANGILERI, ROBERT W. SISLEY, PETER J. DAVIS III, DANIEL A. MUSACCHIO, WILLIAM E. COLEY, JAMES A. PLUNKET, KWAPISZ, JAMES M. BARRON, GREGORY J. ORLANDO, MICHAEL J. DIRIENZO, RICHARD A. WARREN, DONALD V. HANLON,** Firefighters of the Village of Lombard, Illinois,

Petitioners,

VS.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should there be a clear, workable standard for the application of F.R.C.P. 60(b)(6) in order to revive a right to appeal otherwise lost pursuant to F.R.A.P. 4(a)(1)?

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IN THE

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RICHARD SPIKA, ET AL.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

On July 5, 1984, the Honorable Nicholas J. Bua granted a motion to vacate and reenter a judgment granting a motion to dismiss that had been entered on December 23, 1983, pursuant to F.R.C.P. 60(b)(6) and F.R.A.P. 4(a)(1) (the order of the Honorable Nicholas J. Bua is reprinted herein as Appendix C).

On May 22, 1985, the Court of Appeals for the Seventh Circuit dismissed the Petitioners' appeal of the granting of the motion to dismiss on the grounds that it was not timely filed, said opinion is reprinted herein as Appendix A.

On July 2, 1985, the Petitioners' petition for rehearing was denied and is reprinted herein as Appendix B.

JURISDICTION

1. The federal question relative to the application of F.R.C.P. 60(b) to vacate and reenter a judgment as to permit a timely appeal was raised in the district court and in the Court of Appeals for the Seventh Circuit.

2. The petition for writ of certiorari was filed within 90 days after the denial of a petition for rehearing by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on July 2, 1985.

FEDERAL STATUTES INVOLVED

Title 28—Judiciary and Judicial Procedure

Federal Rules of Civil Procedure

Rule 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the

judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

Rule 77. District Courts and Clerks

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

Federal Rules of Appellate Procedure

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

STATEMENT OF THE CASE

Certain police officers and firefighters of the Village of Lombard, Illinois brought a section 1983 action against the Village seeking damages and declaratory relief for alleged violations of their constitutional rights. Upon the Village's motion to dismiss for failure to state a claim, the case was referred to a Magistrate for ruling and decision. On November 29, 1983, the Magistrate recommended the motion be granted. On December 23, 1983, the District Court adopted the Magistrate's report and dismissed the complaint. No notice of this dismissal was received by counsel for either side.

On May 24, 1984, the Petitioners' counsel first learned of the dismissal. On June 15, 1984, the Petitioners filed

a motion to vacate and reenter the judgment so that a timely notice of appeal could be filed. After reviewing the motion for approximately three weeks, the District Court vacated the earlier judgment, reinstated the cause, and dismissed the action from which order the Petitioners filed a notice of appeal on July 13, 1984.

The United States Court of Appeals for the Seventh Circuit did not consider the merits of the case, but instead ordered the parties to address the question of timeliness of the appeal. The Village did not challenge the action of the District Court. Nevertheless, on May 22, 1985, the Court of Appeals held that the District Court improperly granted the relief from its judgment and dismissed the appeal as untimely.

On June 5, 1985, a petition for rehearing with suggestion for rehearing *en banc* was filed. The petition was denied on July 2, 1985.

REASONS FOR GRANTING THE WRIT

In its determination to deny the Petitioners their privilege to appeal the district court's decision, the Court of Appeals has promulgated an unjust and unworkable rule.

The Court of Appeals determined that F.R.C.P. 60(b) would be used to revive a lost right to appeal on a "case by case" basis, after a showing of "diligence", or a reason for lack thereof, or other "special circumstances". The Petitioners submit that these "standards" are not standards at all, and the matter is in need of consideration by this Court.

The opinion of the Court of Appeals adds further confusion to the case law among the circuits regarding what conditions allow the use of F.R.C.P. 60(b) to permit an appeal that would otherwise be time barred by F.R.A.P. 4(a). The standards for relief run the gamut from simple lack of notice and no prejudice to the parties, *Expeditions Unlim. Aquatic Enter., Inc. v. Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974), to different formulations of a "due diligence" or "special circumstances" standard, *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983), to a complete bar to any relief. *Wagner v. United States*, 316 F.2d 871 (2d Cir. 1963).

This Court has recognized that a court may exercise its power under F.R.C.P. 60(b) to avoid the harsh dictates of F.R.A.P. 4(a) and F.R.C.P. 77(d) where the enforcement of strict time limitations would be inequitable. *Klapprott v. United States*, 335 U.S. 601 (1949); and also that in certain circumstances it would not be inconsistent with the Rules or the intent of Congress for a district court to employ F.R.C.P. 60(b) to vacate and reenter an original order to create a fresh judgment from which timely appeals could be perfected. *Jones v. United States*, 459 U.S. 1044 (1982) (Brennan, J., denying cert.).

Without question, F.R.C.P. 77(d) provides that the failure of the clerk of the district court to perform his duty of notification of the entry of a judgment does not extend the time within which an appeal may be taken. However, this rule is primarily intended to preserve the finality of judgments. If the parties never even knew of the entry of a judgment, the winning party cannot rely on it. At the same time, the losing party cannot make a "free, calculated, deliberate" choice not to appeal. *Ackerman v. United States*, 340 U.S. 193, 198 (1950).

Under the circumstances in the case at bar, neither party could have relied on the judgment, as evidenced by the fact that the Village never objected to the request to vacate the judgment. Therefore, the purposes behind F.R.C.P. 77(d) cannot be served by denying the Petitioners their privilege of appealing.

What the decision of the Court of Appeals will do is impose an unnecessary burden on the district judges and the office of the clerk of the court, as well as its hardship on litigants.

The judges' task of hearing the motions has been made impossibly burdensome as they are charged with reviewing undefined circumstances on a "case by case" basis.

The practical effect of the decision is that the clerk of the district court will be inundated with a surge of status requests, which will take time and resources away from more important functions. It would seem likely that the end result of this would be even more mistakes and failures in giving proper notice to litigants.

This result is inevitable because no legal counsel will be able to feel that he has exercised proper diligence in protecting the rights of his clients unless he constantly requests status information on all his cases. Given that decisions on motions often take many months or even years, counsel may be forced to make dozens of requests for status information for *every* case on the court's docket.

Moreover, attorneys will have no choice but to pass the cost of this wasted effort along to their clients. The cost of the time involved, mailing of letters, telephone calls, and having counsel travel personally to the clerk's office to determine the status of matters all must be allocated somewhere. The Petitioners submit that forcing innocent

litigants to bear the costs of protecting against the clerk's mistakes is manifestly unjust.

CONCLUSION

For the reasons enumerated herein, the writ should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2173

RICHARD SPIKA, et al.,

Plaintiffs-Appellants,

v.

THE VILLAGE OF LOMBARD, ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 7557—Nicholas J. Bua, *Judge.*

SUBMITTED MAY 8, 1985*—DECIDED MAY 22, 1985

Before CUDAHY, POSNER and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* Certain police officers and firefighters of the Village of Lombard (Village) brought a section 1983 action against the Village seeking monetary

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

damages and declaratory relief for alleged violations of their constitutional rights under the due process and equal protection clauses of the fourteenth amendment. The district court, adopting the Magistrate's report and recommendation, dismissed the plaintiffs' second amended complaint for failure to state a claim. We do not reach the merits of this appeal because the notice of appeal was not timely filed. Therefore, we dismiss the appeal for lack of appellate jurisdiction.

The Village Board of Trustees passed Ordinance No. 2533, to become effective on June 1, 1982, providing for step-up salary increases to the Lombard police and firefighter forces. The plaintiffs alleged that the Village's fifteen year custom and practice of paying step-up salary increases created an implied contract which became an express contract recognizing the custom and practice by the passage of Ordinance No. 2533. Plaintiffs therefore contended that the failure of the Village to pay the increases constituted a violation of the plaintiffs' liberty interests and property rights protectable under the fourteenth amendment.

Upon the Village's motion to dismiss for failure to state a claim, the case was referred to a Magistrate for ruling and decision. On November 29, 1983, the Magistrate recommended that the motion be granted for failure to show a protected property or liberty interest. Plaintiffs' filed exceptions to the Magistrate's report and recommendation and the Village responded to the plaintiffs' exceptions. On December 23, 1983, the district court adopted the Magistrate's report, dismissed the second amended complaint, and entered judgment. On June 15, 1984, the plaintiffs moved under Rule 60(b)(6) requesting the court to vacate and reenter its judgment so that a timely notice of appeal could be filed. Plaintiffs' counsel stated in an affidavit attached to the motion that neither he nor opposing counsel received notice from the clerk of the district court's entry of judgment although the docket contains a notation that notices were mailed. Apparently, plaintiffs' counsel checked the status of the case on May 24, 1984 and discovered the matter had been dismissed. On July

5, 1984, the district court vacated and reentered the judgment. A notice of appeal was filed July 13, 1984 from the judgment granting the Village's motion to dismiss for failure to state a claim.

This court ordered the parties to address the question of timeliness of the appeal. The Village of Lombard did not take that opportunity to argue that the appeal was untimely, nor has it even challenged the action of the district court granting Rule 60(b)(6) relief. The appellants have submitted essentially the same memorandum as they submitted to the district court in support of their Rule 60(b)(6) motion.

We must consider the timeliness of the appeal even though it was not raised by the parties. *In re Bassak*, 705 F.2d 234, 236 (7th Cir. 1983). The time limitations within which an appeal may be taken are mandatory and a condition to the exercise of our jurisdiction. *See Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978); *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106 (7th Cir. 1985); *United States v. Roberts*, 749 F.2d 404 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1770 (1985); *Sanchez v. Board of Regents*, 625 F.2d 521, 522 n.1 (5th Cir. 1980). If the district court abused its discretion in extending the appeal period by vacating and reentering judgment, we are without jurisdiction. *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983) (en banc); *Kramer v. American Postal Workers Union, AFL-CIO*, 556 F.2d 929, 931 (9th Cir. 1977) (per curiam); *In re Morrow*, 502 F.2d 520, 523 (5th Cir. 1974). *But see Mizell v. Attorney General*, 586 F.2d 942, 944-45 n.2 (2d Cir. 1978) (treating the issue as waived by the parties), *cert. denied*, 440 U.S. 967 (1979).

A notice of appeal must be "filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . ." Fed. R. App. P. 4(a)(1). The district court may extend the time for filing a notice of appeal if appellant files a motion not later than 30 days after the expiration of the 30-day notice period and if excusable neglect or good cause is demonstrated. Fed. R. App. P. 4(a)(5). The extension available

under Rule 4(a)(5) is not applicable in this case. Rather, the issue presented here is whether Federal Rule of Civil Procedure 60(b)(6) can be used to avoid the mandate of Federal Rule of Civil Procedure 77(d) that lack of notice of entry of judgment does not affect the time to appeal prescribed in Federal Rule of Appellate Procedure 4(a).

Rule 77(d) originally established merely that the clerk had a duty to serve by mail a notice of the entry of judgment upon all parties appearing in the case. No statement was made about the effect of a failure by the clerk to perform his duty. In *Hill v. Hawes*, 320 U.S. 520 (1944), however, the Supreme Court was confronted with precisely this problem. Relying on the failure of the clerk to perform the duty outlined in Rule 77(d), the Court held that it was permissible for the trial court to vacate its original order and reenter the same order to allow the taking of a timely appeal. *Id.* at 524.

In response to *Hill*, the Advisory Committee on Rules amended Rule 77(d) in 1946 by adding a final sentence that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." The purpose of the amendment clearly was to overrule *Hill*:

> Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal. . . . It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of judgment.

Fed. R. Civ. P. 77(d), Notes of Advisory Committee on Rules.

The district court gave no reasons for its decision to grant Rule 60(b)(6) relief. Several circuits have held that in certain unique or extraordinary circumstances, it would not be inconsistent with the Rules or the intent of Congress for the district court to vacate and reenter the

original order for the purpose of reviving a lost right to appeal. *See* 9 J. Moore, B. Ward, J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 204.13[5] (1985). Authority to do this has been based on Rule 60(b). Rule 60(b)(6), the basis for relief in this case, provides that, upon motion and under such terms as are just, the district court may relieve a party from a final judgment or order for "any other reason justifying relief from the operation of the judgment." As the Supreme Court has noted, Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949).

Most circuits allow Rule 60(b) relief to revive a lost right to appeal only where the appellant has exercised due diligence to ascertain whether the judgment has been entered or has given sufficient reason for the lack of such diligence. *See* Calkins, *The Emerging Due Diligence Standard for Filing Delayed Notice of Appeal in Federal Courts*, 19 Willamette L. Rev. 609 (1983); *see also Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983) (en banc) (relief proper where diligence shown in checking status and docket sheet entries erroneously out of sequence); *Buckeye Cellulose Corp. v. Braggs Elec. Constr. Co.*, 569 F.2d 1036 (8th Cir. 1978) (per curiam) (three inquiries about the status of the case and reliance on clerk's office statement that counsel would be notified sufficient for relief); *Fidelity and Deposit Co. v. USAFORM Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) (relief proper where diligence of counsel and reliance upon express assurance from the district court that inquiries unnecessary). *Cf. L.Z. v. Parrish*, 733 F.2d 585 (8th Cir. 1984) (copy of memorandum opinion received but not notice of entry of judgment; no relief available where counsel failed to check status of case until 77 days after receiving copy of memorandum opinion); *Wilson v. Atwood Group*, 725 F.2d 255 (5th Cir.) (en banc), *cert. dismissed sub nom. Stark v. Atwood Group*, 105 S. Ct. 17 (1984) (counsel relied on clerk to give notice; unique circumstances do not excuse untimeliness when they are unrelated to counsel's failure to file

the appeal); *Jones v. Estelle*, 693 F.2d 547 (5th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1072 (1983) (no unique circumstances nor reasonable diligence where appellant failed to inquire about status for over 13 months); *Hensley v. Chesapeake & O. Ry. Co.*, 651 F.2d 226 (4th Cir. 1981) (Rule 77(d) puts responsibility on counsel to inquire regarding the status of a case; counsel should in no event be permitted to wait over 6 months before inquiring about a decision on a motion); *Mizell v. Attorney General*, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, 440 U.S. 967 (1979) (counsel must make diligent effort to ascertain status of case); *Kramer v. American Postal Workers Union, AFL-CIO*, 556 F.2d 929 (9th Cir. 1977) (per curiam) (relief not warranted where counsel waited 3 months to inquire about entry of judgment after proposed order adverse to client had been sent to district court for signature).

The District of Columbia Circuit has applied a more liberal standard in *Expeditions Unlim. Aquatic Enter., Inc. v. Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974) (per curiam), stating:

> We believe that a trial court may vacate and re-enter a judgment under Rule 60(b) to allow a timely appeal when neither party had actual notice of the entry of judgment, when the winning party is not prejudiced by the appeal, and when the losing party moves to vacate the judgment within a reasonable time after he learns of its entry.

Id. at 810. *See also Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir. 1980) (dictum). However, we conclude, in accord with the majority of other circuits which have addressed the issue, that the better rule, requiring some diligence, should prevail in this circuit. "The extraordinary relief provided by Rule 60(b) may be granted only upon a showing of exceptional circumstances." *McKnight v. United States Steel Corp.*, 726 F.2d 333, 335 (7th Cir. 1984). Additionally, where Rule 60(b)(6) relief is sought to revive a lost right to appeal, the language of Rule 77(d), as well as the need for finality of judgments, militate in favor of limiting such relief to those instances where some

diligence or other special circumstances are shown. We do not decide in this case the availability of relief based on the other subsections of Rule 60(b). *Cf. Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983) (en banc) (relief based on Rule 60(b)(1) for excusable neglect).

Moreover, the courts have uniformly held that Rule 77(d) bars Rule 60(b) relief when, as here, the *sole* reason asserted for that relief is the failure of a litigant to receive notice of the entry of an order or judgment. *See, e.g., Case v. BASF Wyandotte*, 737 F.2d 1034 (Fed. Cir.) (per curiam), *cert. denied*, 105 S. Ct. 386 (1984); *Wilson v. Atwood Group*, 725 F.2d 255 (5th Cir.) (en banc), *cert. dismissed sub nom. Stark v. Atwood Group*, 105 S. Ct. 17 (1984); *Jones v. Estelle*, 693 F.2d 547 (5th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1072 (1983); *Hensley v. Chesapeake & O. Ry. Co.*, 651 F.2d 226 (4th Cir. 1981); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir. 1980); *Hodgson v. United Mine Workers*, 473 F.2d 118 (D.C. Cir. 1972); *Weedon v. Gaden*, 419 F.2d 303 (D.C. Cir. 1969); *Wagner v. United States*, 316 F.2d 871 (2d Cir. 1963). We agree.

Thus, we need not delineate the exact parameters of the rule we adopt today. Appellants' counsel has asserted no reason for relief other than the failure to receive notice of the entry of the order and judgment. The requisite diligence, sufficient reason for lack thereof, or other special circumstances necessary for Rule 60(b) relief to circumvent Rule 4(a) will require case-by-case analysis. While we do not draw the line in this case, it suffices to say that failure to check the status of a case for six months, where a Magistrate's report and recommendation has already been submitted to the district court, is not sufficient diligence warranting Rule 60(b)(6) relief.

For the foregoing reasons, the district court's grant of Rule 60(b)(6) relief was improper thus making the notice of appeal untimely. We are therefore bound to DISMISS the appeal for failure to file a timely notice.

DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 2, 1985

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

RICHARD SPIKA, et al.,

Plaintiffs-Appellants,

No. 84-2173 vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 7557—Nicholas J. Bua, *Judge.*

ORDER

On June 5, 1985, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing *en banc.* All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc.* Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Nicholas J. Bua

Cause No. 82 C 7557 Date 6-15-84

Title of Cause: Richard Spika v. Village Lombard

Brief Statement of Motion:
Motion to Extend Filing of Notice of Appeal pursuant to FRAP 4(a) and FRCP 60(b)(6)

Names and Addresses of moving counsel:
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Berwyn IL 60402

Representing: Plaintiff

Names and Addresses of other counsel entitled to notice and names of parties they represent:
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ORDER

On plaintiffs' motion, this court's order of December 23, 1983 dismissing cause is vacated and set aside. This court adopts the Magistrate's report and recommendations and orders plaintiffs' second amended complaint dismissed for failure to state a cause of action.

/s/ Bua, Jr.

No. 85-562

Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1985

RICHARD SPIKA, CHARLES KUEHNE, STEVEN POKORNY, RICHARD ENGEL, RICHARD SHAFER, DANE CUNY, FRANK PARTIPILO, RAYMOND CLARK, MARK GOUTY, PAUL NOLAN, ORIN WALKER, RICH MONTALTO, DANIEL NEUSTADT, DANIEL KELLY, BARBARA DURNIL, RICHARD STICKA, JOSE PEREZ, JAMES GLENNON, CHARLES GUTSMIEDL, Patrolmen of the Village of Lombard, Illinois, and **FRANK J. ESPOSITO, GLENN Q. FOSTER, SCOTT M. RYAN, MICHAEL J. TORRENCE, FRANK D. ANGILERI, ROBERT W. SISLEY, PETER J. DAVIS III, DANIEL A. MUSACCHIO, WILLIAM E. COLEY, JAMES A. PLUNKET, KWAPISZ, JAMES M. BARRON, GREGORY J. ORLANDO, MICHAEL J. DIRIENZO, RICHARD A. WARREN, DONALD V. HANLON,** Firefighters of the Village of Lombard, Illinois,

Petitioners,

vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SPIKA, CHARLES KUEHNE, STEVEN POKORNY, RICHARD ENGEL, RICHARD SHAFER, DANE CUNY, FRANK PARTIPILO, RAYMOND CLARK, MARK GOUTY, PAUL NOLAN, ORIN WALKER, RICH MONTALTO, DANIEL NEUSTADT, DANIEL KELLY, BARBARA DURNIL, RICHARD STICKA, JOSE PEREZ, JAMES GLENNON, CHARLES GUTSMIEDL, Patrolmen of the Village of Lombard, Illinois, and **FRANK J. ESPOSITO, GLENN Q. FOSTER, SCOTT M. RYAN, MICHAEL J. TORRENCE, FRANK D. ANGILERI, ROBERT W. SISLEY, PETER J. DAVIS III, DANIEL A. MUSACCHIO, WILLIAM E. COLEY, JAMES A. PLUNKET, KWAPISZ, JAMES M. BARRON, GREGORY J. ORLANDO, MICHAEL J. DIRIENZO, RICHARD A. WARREN, DONALD V. HANLON,** Firefighters of the Village of Lombard, Illinois,

Petitioners,

VS.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD SPIKA, et al.,

Plaintiffs,

vs.

THE VILLAGE OF LOMBARD,

Defendant.

REPORT AND RECOMMENDATION OF MAGISTRATE CARL B. SUSSMAN

TO THE HONORABLE NICHOLAS J. BUA, one of the Judges of the United States District Court for the Northern District of Illinois.

This case is an action brought pursuant to 42 U.S.C. Section 1983 by certain patrolmen and firefighters of the Village of Lombard, wherein they seek both monetary damages and declaratory relief against the Village as the sole defendant for alleged violations of their constitutional rights. Subject matter jurisdiction with respect to the cause properly lies under 28 U.S.C. Sections 1343, 1331, 2201 and 2202. Defendant had filed a motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

The controversy in this matter revolves around Ordinance No. 2533 passed by the Board of Trustees of the Village of Lombard, to become effective on June 1, 1982, which provides for step-up salary increases to the Lombard police and firefighter forces. The Plaintiffs allege that the Defendant Village's custom and practice of fifteen years of paying step-up increases created an implied con-

tract which became an explicit contract recognizing that custom and practice by the passage of said ordinance. Plaintiffs therefore contend that the failure of the Village to pay the increases as provided constitutes a violation of Plaintiffs' liberty interest and property right protectable under the due process clause of the Fourteenth Amendment to the United States Constitution.

DISCUSSION

It is a well accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Although the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts which are the basis of his claim, *Id.* at 47, a plaintiff, in order to state a claim upon which relief can be granted under 42 U.S.C. Section 1983, must make some specific allegations of fact indicating the deprivation of civil rights, rather than stating simple conclusions. *Koch v. Yunich*, 533 F.2d 80 (2d Cir. 1976); *Powell v. Jervis*, 460 F.2d 551 (2d Cir. 1972); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

To satisfy the prerequisite for an assertion of the constitutional requirements of due process, a party must implicate a protected interest in either life, liberty or property. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 1701, 33 L.Ed.2d 548 (1972). Thus, in order to invoke either a procedural or substantive due process safeguard, Plaintiff must be able to establish the existence of a protected liberty interest or property right encompassed by the due process clause. *Board of Regents v. Roth*, *supra*; *Perry v. Sindermann*, 408 U.S. 593 (1972); *Webster v. Redmond*, 599 F.2d 793 (7th Cir. 1979).

In the case at bar, in support of their claim of deprivation of a liberty interest, Plaintiffs merely allege that the ordinance in question created a liberty interest, namely

the fundamental liberty interest to engage in the common occupation of life, such as police work. However, there is no suggestion that the Defendant, in failing to pay for the step-up increases, imposed on Plaintiffs a stigma or other disability that foreclosed their freedom to take advantage of other employment opportunities, including police work. *See Board of Regents v. Roth, supra*; *Bishop v. Wood*, 426 U.S. 341 (1976). Had they done so, this would be a different case. For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

The mere allegation that Plaintiffs did not receive the step-up salary increases as provided in the ordinance can hardly be sustained as a loss of a liberty interest within the meaning of the due process clause. The Supreme Court in *Board of Regents v. Roth, supra*, emphasized that it would "stretch the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.*, at 575. This same conclusion would apply if it is suggested that a public employee is deprived of "liberty" when he does not receive a certain salary or wage rate, especially in light of the fact that a salary, which is fixed by a municipal body, is a benefit that can be either diminished or increased at the will of the legislative body. *Koch v. Yunich, supra.*

Thus, absent some showing that Plaintiffs' standing and association in their community has been damaged or that Plaintiffs' reputation, honor or integrity has been impugned as a result of the Defendant's action, it is this court's opinion that Plaintiffs have failed to state a claim upon which relief can be granted on the basis of any violation of a protected liberty interest. *See, Bishop v. Wood, supra*, and *Perry v. Sindermann, supra.*

On the other hand, for due process purposes, to have a cognizable property interest in governmental benefits, it is not enough that the claimant has a demonstrated

need for such benefits, rather he must have a legitimate claim of entitlement to them. *Board of Regents v. Roth, supra*; *Confederation of Police v. City of Chicago*, 481 F. Supp. 566 (N.D. Ill. 1980); *Anderson v. City of Northlake*, 500 F.Supp. 863 (N.D. Ill. 1980). Such an entitlement may stem from a state law conferring the benefit in issue, or from rules or mutually explicit understandings which would support the claim presented. *Confederation of Police v. City of Chicago, supra*, at 569. Regarding this question, the Plaintiffs claim that the ordinance and the custom and practice of fifteen years embodied in the passage of said ordinance are sufficient support for a claim of entitlement. The sufficiency of this contention, however, must be decided by reference to state law. *Board of Regents v. Roth, supra*; *Bishop v. Wood, supra.*

Under Illinois law, it is well settled that public employees do not have a property interest in the continued application of any specific rate or method of compensation. *Chicago Patrolmen's Association v. City of Chicago*, 56 Ill.2d 503, 309 N.E.2d 3 (1974); *Gathemann v. City of Chicago*, 263 Ill. 292, 104 N.E. 1085 (1914). Therefore, under Illinois law, the failure of the Defendant to pay for the step-up increases did not deprive the Plaintiffs of any property rights arising from the ordinance in question.

The Plaintiffs, though, also argue that, through the Defendant's act of enacting the ordinance, a contractual relationship, either expressed or implied, was established between the parties. Such a relationship, they contend, created for the officers a protected property interest in the receipt of the contractually-provided salary increases. In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. *Anderson v. City of Northlake, supra* at 866; *see also In Re Application of Skidmore*, 75 Ill.2d 33, 387 N.E.2d 290 (1979). If it provides for the execution of a written contract on behalf of the state or municipal body, the case for a binding obligation is clear. *Hall v. Wisconsin*, 103 U.S. 5 (1880). On the other hand, a legislative act which merely fixes salaries of officers does not create

any contract in their favor and the compensation named may be altered at the will of the legislature. *Dodge v. Board of Education*, 302 U.S. 74 (1937). The presumption, according to the United States Supreme Court is that "such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* at 79. The same conclusion was reached by the Illinois Supreme Court when it stated:

> Ordinances fixing salaries are not contracts with officers for the full term of their office. (Citation omitted) . . . The salaries of such officers may be reduced or otherwise regulated, as the municipality may decide. . . . The salary created by (the ordinance) is not property. The right of compensation grows out of the rendition of services and not out of any contractual relation." (Citation omitted).

Gathemann v. City of Chicago, *supra* at 295, 104 N.E. at 1087. From the above, it must be concluded that, because of the nature of the ordinance, no valid contract ever existed between the parties. As to plaintiffs' implied contractual obligations theory, the contention seems to be that, as a result of the officers' reliance upon ordinance No. 2533, which embodied the defendant's custom and practice of fifteen years to pay for step-up salary increases, an implied contractual relationship was created. There are many difficulties with this contention. First of all, under the principles set forth in *Dodge* and *Gathemann*, the ordinance in question did not confer upon the officers any state-law-created property right; therefore, any reliance upon said ordinance is unwarranted. Furthermore, it should be noted that ordinance No. 2533 was not an appropriation ordinance. As such, it cannot be given effect unless there was a prior appropriation. The critical legal consideration is found in Section 8-1-7 of the Illinois Municipal Code, which provides in pertinent part:

> "No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concurring that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof."

Ill.Rev.Stat. 1971, Ch. 24, par. 8-1-7.

That an appropriation ordinance was subsequently passed and alleged by the plaintiffs to encompass the step-up salary increases as provided by ordinance No. 2533, cannot operate to validate any contractual obligations created by ordinance No. 2533. The Illinois Supreme Court, in interpreting Section 8-1-7, had expressly held that:

> Under Section 8-1-7 of the Municipal Code, any contract made without a *prior* appropriation is null and void. (Emphasis added).

Chicago Patrolmen's Association v. City of Chicago, supra at 505. The requirement is thus plain and clear; since the appropriation ordinance in question was passed nearly two months after the passage of ordinance No. 2533, no contract, either expressed or implied, can be deemed valid.

Consequently, because Plaintiffs can prove under their Complaint no set of facts which would entitle them to relief and that their constitutional claims are wholly insubstantial, Plaintiffs' Second Amended Complaint should be dismissed.

CONCLUSION

For the aforementioned reasons, it is respectfully recommended that the District Court dismiss Plaintiffs' Second Amended Complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Counsel are given ten (10) days from the date hereof, unless otherwise extended by the court, to file exceptions to said Report and Recommendation with the Honorable Nicholas J. Bua.

Respectfully submitted,

/s/ Carl B. Sussman
United States Magistrate

Dated: November 29, 1983

cc:(w/o encls.)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Nicholas J. Bua

Cause No. 82 C 7557 Date December 23, 1983

Title of Cause: Richard Spika v. Village of Lombard

* * * * *

ORDER

This Court adopts the report and recommendation of Magistrate Sussman dated November 29, 1983. The second amended complaint is dismissed for failure to state a claim upon which relief can be granted.

/s/ Bua, J.

JUDGMENT IN A CIVIL CASE

United States District Court	NORTHERN DIST. OF ILL., EASTERN DIV.
RICHARD SPIKA, et al.	No. 82 C 7557
v.	
VILLAGE OF LOMBARD	Judge NICHOLAS J. BUA

* * * * *

X *Decision by Court.* This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

plaintiffs take nothing and action is dismissed for failure to state a claim upon which relief can be granted.

H. Stuart Cunningham
Clerk

/s/ Frances D'Andrea
Deputy Clerk

Date Dec. 23, 1983

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
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(3)

No. 85-562

In The

Supreme Court of the United States

October Term, 1985

RICHARD SPIKA, CHARLES KUEHNE, STEVEN POKORNY, RICHARD ENGEL, RICHARD SHAFER, DANF CUNY, FRANK PARTIPILO, RAYMOND CLARK, MARK GOUTY, PAUL NOLAN, ORIN WALKER, RICH MONTALTO, DANIEL NEUSTADT, DANIEL KELLY, BARBARA DURNIL, RICHARD STICKA, JOSE PEREZ, JAMES GLENNON, CHARLES GUTSMIEDL, Patrolman of the Village of Lombard, Illinois, and FRANK J. ESPOSITO, GLENN Q. FOSTER, SCOTT M. RYAN, MICHAEL J. TORRENCE, FRANK D. ANGILERI, ROBERT W. SISLEY, PETER J. DAVIS III, DANIEL A. MUSACCHIO, WILLIAM E. COLEY, JAMES A. PLUNKET, KWAPISZ, JAMES M. BARRON, GREGORY J. ORLANDO, MICHAEL J. DIRIENZO, RICHARD A. WARREN, DONALD V. HANLON, Firefighters of the Village of Lombard, Illinois,

Petitioners,

vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

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Petitioners,

vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Village of Lombard, Illinois, respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit in this proceeding on May 22, 1985.

REASON FOR DENYING THE WRIT

I. A LITIGANT'S FAILURE TO CHECK THE STATUS OF A CASE FOR SIX MONTHS, WHERE A MAGISTRATE'S REPORT AND RECOMMENDATION HAS ALREADY BEEN SUBMITTED TO THE DISTRICT COURT, IS NOT SUFFICIENT DILIGENCE WARRANTING F.R.C.P. 60(b) RELIEF TO REVIVE A RIGHT TO APPEAL OTHERWISE LOST PURSUANT TO F.R.A.P. 4(a)(1).

F.R.C.P. 77(d) provides that lack of notice of entry of a judgment does not affect the time to appeal prescribed in F.R.A.P. 4(a). Petitioners' attempt to circumvent the plain meaning of Rule 77(d) by invoking F.R.C.P. 60(b)(1) and (6), which states that a party may be relieved of a final judgment by reason of mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from such a judgment.

However, petitioners can offer no reason, other than neglect, for their failure to file a timely notice of appeal. From November 29, 1983, the date of Magistrate's recommendation that respondent's Motion to Dismiss be granted, to May 24, 1984, petitioners did not make a single phone call to the district court clerk, inquiring as to the status of the case.

Petitioners contend that the Court of Appeals' decision, if allowed to stand, will result in the district court's being "inundated" with status requests from anxious practitioners. Respondent submits that such a scenario is a gross exaggeration, unsupported by any statistics or even estimates regarding the total number of open cases presently in the district court; or, of those open cases, the total number with pending motions; or, of those total pend-

ing motions, the total number of dispositive motions from the disposition of which the losing litigants would have thirty days to appeal.

The Court of Appeals' ruling is consonant with that of the majority of the other circuits to have considered the question. See, e.g., *Case v. BASF Wyandotte,* 737 F.2d 1034 (Fed. Cir.) (per curiam), *cert. denied,* 105 S.Ct. 386 (1984); *Wilson v. Atwood Group,* 725 F.2d 255 (5th Cir.) (en banc), *cert. dismissed sub nom. Stark v. Atwood Group,* 105 S.Ct. 17 (1984); *Jones v. Estelle,* 693 F.2d 547 (5th Cir. 1982) (per curiam), *cert. denied,* 460 U.S. 1072 (1983); *Hensley v. Chesapeake & O. Ry. Co.,* 651 F.2d 226 (4th Cir. 1981); *Scola v. Boat Frances, R., Inc.,* 618 F.2d 147 (1st Cir. 1980); *Hodgson v. United Mine Workers,* 473 F.2d 118 (D.C. Cir. 1972); *Weedon v. Gaden,* 419 F.2d 303 (D.C. Cir. 1969); *Wagner v. United States,* 316 F.2d 871 (2d Cir. 1963).

CONCLUSION

There are no special or important reasons for reviewing the case. The Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals of the Seventh Circuit should be denied.

Respectfully submitted,

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(4)
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VS.

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Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

In this case the Petitioners have asked this Court to clarify the law regarding the use of F.R.C.P. 60(b) to revive a right of appeal otherwise lost pursuant to F.R.A.P. 4(a)(1). As the Respondent concedes, the circuits are not in agreement on this point. Therefore, the Petitioners respectfully submit that the matter is in need of attention by this Court.

The Respondent seems to suggest that this Court should not consider this case because the Petitioners did not exercise sufficient diligence to warrant Rule 60(b) relief, and should not have been surprised by the Court of Appeals' ruling. In this regard, it should be noted that the Respondent exercised no greater diligence. Counsel for the Re-

spondent did not telephone the district court clerk or otherwise inquire into the status of the case, nor did they offer any opposition to having F.R.C.P. 60(b)(6) invoked to revive the right to appeal in this instance. This would suggest that, prior to the case at bar, counsel for both sides had assumed that the Seventh Circuit would follow the District of Columbia Circuit's practice of allowing Rule 60(b)(6) relief in situations where the clerk failed to give proper notice to litigants. *See Expeditions Unlim. Aquatic Enter., Inc. v. Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974).

The Respondent also suggests that Petitioners' concerns about the Court of Appeals' decision on the clerk's office are unfounded. The Petitioners respectfully submit that this Court can take judicial notice of the docket congestion in the federal courts, with the resulting widespread failures in giving proper notice to litigants that are occurring. Given that, it does not seem unreasonable to suggest that the Court of Appeals' decision will burden the system to an even greater extent.

Respectfully submitted,

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